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ARGUMENT FOR THE INTERSTATE COMMERCE COMMISSION.

I.

STATEMENT OF CASE.

Defendants, the Southern Pacific Company and the Atchison, Topeka and Santa Fe Railway Company, are the initial members of the lines which transport oranges, lemons, and other citrus fruit from Los Angeles, Cal., and other points of production in Southern California, to markets outside that State.

The Southern Pacific Company has two lines, one extending from Los Angeles *via* El Paso, Tex., to New Orleans, La., and the other from Los Angeles *via* Sacramento, Cal., to Ogden, Utah.

The Atchison, Topeka and Santa Fe Railway Company, in connection with defendants, the Southern California Railway Company and the Santa Fe Pacific Railway Company, constitutes and operates a line, part of what is known as the "Santa Fe System," extending from Los Angeles to Chicago, Ill.

At numerous junction points on these lines of the defendants and at their termini (Chicago, Ogden, and New Orleans) connection is made with other carriers, and through lines are formed over which the citrus fruit is transported on to practically all the markets of the United States.

This transportation from points of shipment in California to points of consignment in other States is conducted under a joint through rate fixed by the defendants and published in a joint tariff issued by them. The rate thus established is a single or "blanket" rate of $1.25 per hundred pounds, and the tariff names about 153 roads which are connections of defendants and participate in the through rate fixed by the tariff.

The rate of $1.25 had been in force a number of years previous to January 1, 1900, and has since been maintained. There has been no change in the rate since the citrus-fruit business became material in amount. (Rec., 70.) While, however, prior to January 1, 1900, shippers of citrus fruit had been allowed the privilege, or, more properly speaking, had exercised the right, of selecting the route beyond the roads of defendants over which their traffic should be transported by the connections of defendants, the tariff published by the defendants and made effective at that date promulgated a rule, called a "routing rule," by which this right of selecting the route was denied to the shippers and reserved to, or assumed by, the defendants as initial carriers. That rule is as follows:

"In guaranteeing the through rate named herein" ($1.25) "the absolute and unqualified right of routing beyond its own terminal is reserved to initial carriers giving guarantee." (Rec., 467.)

The shippers made complaint before the Commission, on various grounds, against this rule (Rec., 17, 18), and the Commission, after thorough investigation, held that the rule "in its application by the defendants" to the citrus fruit traffic "subjects the owners and shippers of such traffic to undue, unjust, and un-

reasonable prejudice and disadvantage, and gives to the carriers an undue and unreasonable preference and advantage." (Rec., 77.) This is a finding of a violation of section 3 of the act to regulate commerce, which provides, among other things—

"That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, *in any respect whatsoever*, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage *in any respect whatsoever*."

In pursuance of its said finding the Commission issued the order sought to be enforced in this case, which requires the defendants, after the 20th day of June, 1902,

"To cease and desist from maintaining or enforcing a rule or regulation whereby shippers of oranges, lemons, or other citrus fruits from points in southern California to points on and east of the Missouri River and other Eastern destinations are denied the right of designating for the transportation of their said property and having such property transported *over any of the defendants established and published joint or continuous lines or routes between any of the aforesaid points of shipment and destination at the published schedule rate or charge applying over such route or line*." (Rec., 84.)

The order further required the defendants, after the 20th day of June, 1902,

"To cease and desist from failing and refusing as initial carriers to keep open for the use of the public their published rate or charge for the transportation of oranges, lemons, and other citrus fruit from points in southern California to points on and east of the Missouri River for and during all of the time such rate or charge may be lawfully in force, over each and every

of the established routes upon which the said rate or charge is in their published joint schedules or tariffs stated to apply, and from further continuing their present practice whereby the application of such published rate or charge over any of such published established routes when specified by a shipper for the transportation of its property is allowed to or withheld from such shipper and the property shipped by him as they, the said defendants or either of them, may determine." (Rec., 84.)

Section 16 of the act to regulate commerce requires the courts to enforce "*lawful orders*" of the Commission. The question, therefore, in this case is whether this order is a lawful order, and that depends upon whether or not the "routing rule" of the defendants in question is a lawful rule or one which the defendants had the right to make.

II.

THIS CASE NOT WITHIN THE RULE OF THE COMMON LAW.

The defendants, in the first place, base their alleged right to make this rule upon the right of routing as they claim it exists at common law, and contend, in the language of the printed argument filed for the Southern Pacific Company in the court below, that "at common law the right was absolutely in the carrier to select his own route, his own instrument, his own agent, in shipping beyond his own line." (P. 16.)

This is not true absolutely. It is only true where the initial carrier assumes the common-law liability of a common carrier beyond its own line and on the lines of its connections. At common law a common carrier is "in the nature of an insurer" against damage or loss of goods during the carriage on its own line from any cause except the act of God or the public enemy (Red-

field, Law of Railways, Vol. II, p. 6; Chitty on Contracts, Sixth Am. Ed., p. 181), and the common-law rule giving the initial carrier the right to route the traffic beyond its own line only applies where the initial carrier practically extends its own line and becomes a common carrier with common-law liability over the entire route. The cases cited by counsel for defendants are of that character.

In Atchison, Topeka & Santa Fe R. R. Co. v. Denver & New Orleans R. R. Co., one of the principal cases relied upon by the defendants, this court says:

"At common law, a carrier is not bound to carry except on his own line, and we think it quite clear that if he contracts to go beyond he may, *in the absence of statutory regulations to the contrary*, determine for himself what agencies he will employ. His contract is equivalent to an extension of his line for the purposes of the contract, *and if he holds himself out as a carrier beyond the line*, so that he may be required to carry in that way for all alike, he may nevertheless confine himself in carrying to the particular route he chooses to use. He puts himself in no worse position, by extending his route with the help of others, than he would occupy if the means of transportation employed were all his own. He certainly may select his own agencies and his own associates for doing his own work." (110 U. S., 680.)

The court, it will be noted, bases the right of the initial carrier to choose the route beyond his own line on that carrier's holding "himself out as a carrier beyond his own line"—that is to say, upon his assuming the common-law liability of a carrier on the extended line.

In the present case the defendants, the initial carriers, contract for exemption from common-law liability and, therefore, beyond their own lines are mere forwarders

and not common carriers. On this point the Commission finds:

"Citrus fruits are carried at the $1.25 rate only at the owners' risk of 'damage from weather, decay, shortage, and delay,' and the transportation charge must be prepaid or guaranteed by the shipper."

(Transcontinental Freight Bureau, Eastbound Special Tariff, effective January 1, 1900. Rec., top p. 474.)

The Commission further finds:

"Neither does the initial carrier assume liability for damage resulting from the negligence of *any connecting line. Hence for such damage the shipper must seek recovery from such connecting carriers in distant States.*" (Report of Commission, Rec., 75.)

The reason of the rule giving the initial carrier the right of routing being the assumption by the carrier of responsibility for damage or loss occurring beyond its own line on the roads of its connections, and that reason not existing in the present case, the rule itself ceases. (*Cessante ratione, cessat ipsa lex.*)

The shippers, being compelled to seek recovery from connecting carriers for damage or loss, should for self-protection be allowed to select the route. On this point the Commission says in its report:

"One of the reasons frequently advanced against the compulsory formation of through routes by carriers is that they might thereby be forced to make traffic arrangements and interchange freight with insolvent connections; yet in the present case the shipper may, under the rule in question, be compelled to seek recovery of damages from an insolvent connecting carrier over whose road his traffic has been routed contrary to his express direction, or one that does not promptly or fairly adjust damage claims." (Commission's report, Rec., 75.)

In the opinion of the Circuit Court on the demurrer it is said:

"At common law, where the initial carrier undertakes to carry to a destination beyond its own line, the carrier has a right to select the connecting route. This, however, is because of the initial carrier's liability beyond its own road. Since, however, in the case at bar, the initial carrier is relieved of that liability, such carrier is beyond its own line really a mere forwarder, and it would seem, as contended by complainant, that, *under such circumstances, an application of the common law principles would give to the shipper, rather than to the initial carrier, the right of routing in* the absence of any agreement to the contrary." (Rec., bot. p. 1019, top p. 1020.)

It is thus seen that the reason which is invoked in behalf of the carrier's right of routing and upon which that right is based at common law applies in this case to the shipper, and not to the carrier. If the carrier is allowed the right of routing when necessary for self-protection, why should not the same rule be applied to the shipper?

III.

THIS CASE CONTROLLED BY THE PROVISIONS OF THE ACT TO REGULATE COMMERCE.

A further distinction between the case at bar and the cases cited in behalf of the defendants is the fact that the case at bar is controlled by the provisions of the act to regulate commerce.

In the quotation, *supra*, from the opinion in *Atchison, Topeka & Santa Fe R. R. Co.* v. *Denver & New Orleans R. R. Co.* (110 U. S., 667), this court recognizes that even where a carrier has contracted to carry beyond his own line, and therefore has the right

at common law to select the route, this right only exists in the "absence of statutory regulations to the contrary"—the language of this court being that "if he (the carrier) contracts to go beyond his own line, he may *in the absence of statutory regulations to the contrary*, determine for himself what agencies he will employ."

The routing rule of defendants is inconsistent with and contrary to the spirit, if not the letter, of section 6 of the commerce act which, among other things, provides:

"In cases where passengers and freight pass over *continuous lines or routes* operated by more than one common carrier and the several common carriers operating *such lines or routes* establish joint tariffs of rates or fares or charges for such *continuous lines or routes*, copies of such joint tariffs shall also in like manner be filed with the Commission. The joint rates, fares, and charges on such *continuous lines*, so filed as aforesaid, shall be made public by such common carrier * * *."

The various roads and routes beyond the terminals or junction points on the lines of defendants over which the transportation of citrus fruit is continued from said terminals or junction points to points of destination are published by the defendants in their joint tariff in connection with the rate. This is the invariable practice not only of these defendants but of all carriers. The tariff would be incomplete unless it named the routes, and the publication of the rate without naming the routes to which the rate is applicable would be of comparatively little service.

As section 6 requires that the rates "for continuous lines or routes" shall be filed with the Commission and made public by the common carrier, the routes to which the rate is applicable are made descriptive

of the rate, and it is manifest that the routes are as much a part of such tariffs as the rates themselves.

Section 6 also provides that "the Commission may determine and prescribe the form in which the schedules of rates for continuous routes shall be prepared and arranged," and the Commission, in pursuance of this authority, has ordered that such schedules shall "indicate the route and names of connections." (Rec., bot. p. 73.) This order being in pursuance of authority given by law, has all the force of the law itself.

Section 6 further requires that the schedules of rates for continuous lines or routes "shall be kept open to public inspection." For what purpose? Manifestly for the purpose of informing the public what routes are available to them and under what rates.

It will be noted that the order of the Commission only applies to these published rates and routes, and only requires the defendants to keep open to citrus fruit shippers these rates and routes which they have themselves established and published as available to the public; in other words, it allows the shippers to make selection from among these routes. It would seem natural and proper that, having paid the rate charged, the shipper should have the right of choice of the route over which his traffic shall be carried—particularly, as among routes established and published by the carriers under the law as those to which the rate is applicable. We contend that a rule denying this privilege or right is contrary to natural right and in conflict with the manifest purpose of the statute.

(This matter is forcibly presented in the report of the Commission, Rec., 73–75.)

Furthermore, if the common-law rule giving initial carriers, where they assume the liability of common

carriers beyond their own lines, the right of selecting their connections, has any application to the present case, that rule is fully satisfied by the fact that as to their regularly published routes beyond their own lines the defendants have selected their connections.

IV.

THE ROUTING RULE GIVES AN UNDUE PREFERENCE AND SUBJECTS TO AN UNDUE PREJUDICE IN VIOLATION OF SECTION 3 OF THE ACT TO REGULATE COMMERCE.

The Commission finds, as before stated, that the routing rule, "in its application by the defendants to the traffic in question subjects the owners and shippers thereof to undue prejudice * * *," and this is also alleged in Paragraph XI of the bill of complaint filed in the court below.

This is a finding and allegation of a violation of that provision of section 3 of the commerce act which forbids such preferences and prejudices as "to any particular person, company, firm, corporation, or locality or any particular description of traffic, *in any respect whatsoever.*"

Preferences or prejudices may be in respect to rates or routing or facilities or any other matter as to which a preference can be given or a prejudice inflicted, and therefore the statute, in order to cover every form of preference or prejudice, uses the all-embracing words "*in any respect whatsoever.*"

The connections of the defendants and the lines established by them beyond their own lines differ as to desirability. Some of these connections are better built, better managed and operated, and more reliable financially than others, and some of the lines are shorter and freer from risk than others and more

desirable in other particulars. Hence, while the rate by all is the same, there is a choice between them, and the shippers of all traffic except citrus fruit are allowed to avail themselves of this choice. The citrus-fruit traffic is the only kind of freight as to which the defendants deny to shippers the right of choice of route. (Rec., 62.) This clearly gives to other traffic and the shippers thereof an undue preference, and subjects citrus fruit and the shippers thereof to an undue prejudice. It is, moreover, an unjust discrimination against citrus fruit and the shippers thereof.

As said by the Commission in its report—

"If as matter of right the initial carriers, parties to the joint continuous routes, which with other carriers they have formed, may control the routing and deny the shipper any choice or control in a selection as between the different routes thus formed, then a route or tariff may be available to one shipper but not to another and open one minute to a shipper, but closed the next; this to be determined by the carriers' agents according as they may desire to distribute the shippers' business among one another from time to time or for any reason whatever. Such we do not believe to be the meaning of the law. We find nothing in the statute authorizing routes or tariffs of any kind available to shippers only at the option and in the discretion of the carriers and upon such varying conditions and circumstances as they may from day to day or from hour to hour see proper to be governed by, regardless of the wishes and interest of the shipper." (Rec., 73.)

V.

ROUTING BY INITIAL CARRIERS DESTRUCTIVE OF COMPETITION.

It is manifest that the routing of traffic by the initial carriers restrains or prevents competition between their connections. The connections over which the traffic

shall move beyond the roads of the initial carriers being determined by the initial carriers, there is no field for competition between those connections.

The routing of the traffic by the initial carriers so as to carry out their pooling agreement—that is, the routing of the traffic so as to give each of the initial carriers a certain territory and an equal or certain proportion of the traffic—also stifles competition between the initial carriers themselves.

Competition is favored by the laws. The object of the pooling section (sec. 5) of the interstate-commerce act is to prevent "any contract, agreement, or combination" between otherwise competing carriers by which competition between them may be done away with. In *East Tennessee, Va. and Ga. Ry. Co.* v. *Interstate Commerce Commission*, it is said: "The interstate-commerce law, it is conceded, was intended to encourage normal competition. It forbids pooling for the very purpose of allowing competition to have effect." (99 Fed. Rep., 61.)

This court holds that the suppression of competition is violative of the so-called "anti-trust act," in that such suppression restrains trade and commerce by "keeping rates and charges higher than they might otherwise be under the laws of competition." (Joint Traffic Association case, 171 U. S., 569, 571, 577; *U. S.* v. *Freight Association*, 166 U. S., 341.)

The ground upon which competition is favored is that it conduces to the reasonableness of rates or to the protection of the public from unreasonably high or excessive rates. In *U. S.* v. *Freight Association*, supra, this court says, "competition will itself bring charges down to what may be reasonable." (166 U. S., 339.)

The act to regulate commerce (sec. 1) in prohibiting unreasonableness of rates in effect forbids whatever conduces to such unreasonableness, therefore the routing rule, in that it stifles competition, is in violation of that act.

VI.

DEFENDANTS CONCEDE TO THE SHIPPER THE RIGHT TO SELECT THE ROUTE ON CONDITION OF HIS PAYING A HIGHER RATE (THE SUM OF THE LOCALS) FOR THE PRIVILEGE.

This Results in Violations of Sections 1, 2, and 6 of the Law.

The defendants concede to shippers of citrus fruit the right to ship over the route of their choice, but if it happens not to be the route of the defendants' choice they require the shippers to pay for the right; in other words, to pay a rate which is the sum of the locals of the several carriers composing the through line, this sum of the locals being much higher than the regularly established and published rate filed with the Interstate Commerce Commission.

Under this regulation the shipper of citrus fruit who chooses a route other than that selected by the initial carrier pays a higher rate than the shipper of the same kind and quantity of citrus fruit between the same termini for whom the carrier has selected the route in question. In both cases the carrier's risk and service are precisely the same and the traffic of both shippers may be on the same train, but a higher rate is exacted from the one than from the other.

This is an unjust discrimination in violation of section 2 of the act to regulate commerce which this court holds applies to shippers over the same line between

the same termini. (*Wight* v. *U. S.*, 167 U. S., 512.) That section forbids—

"The charging or receiving" (by a carrier subject to the act) "from any person or persons a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property * * * *than it charges or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.*"

This regulation of defendants as to the charging of local rates also violates that provision of section 6 of the law, which forbids the charging or receiving "from any person or persons a greater or less compensation for the transportation of persons or property between points as to which a joint rate, fare, or charge is named therein *than is specified in the schedule filed with the Commission in force at the time.*"

Furthermore, the exaction of the sum of the locals as a through rate results in an unreasonable or excessive rate, in violation of section 1 of the law.

Local rates are made for strictly local hauls and are many times higher per ton per mile than proportions of through rates for the same distance. This is because of the well-established fact that local hauls are much more expensive per mile to the carrier than long through hauls.

In *King* v. *Railroad Company* (4 I. C. C. R., 262) it is said:

"The local rates are made for many trains that run slow, stop generally at every station, delivering and taking on freight, chiefly in parcels not loaded or unloaded by the shippers or consignees, but loaded or unloaded

by the servants of the company. (They, of course, carry freight occasionally in carloads to local points.) Such shipments are, of course, much more expensive than through freights, and for such services an additional charge is reasonable, and the laws permit it."

After quoting the above, the court, in *Augusta Southern Railroad Company* v. *Wrightsville and Tennille Railroad Company* (74 Fed. Rep., 527), says:

"No fair or equitable construction will justify the exaction of local rates for freights not local, where services belonging to local rates is not offered."

In *Minneapolis and St. Louis R. Co.* v. *Minnesota* (186 U. S., 262) the Supreme Court says:

"There is an underlying fallacy in the argument of the railroad company in this connection that the sum of two reasonable local rates can not be unreasonable. * * * We can not assent to this proposition. The practice of railways in this country is almost universally to the contrary, and a through tariff is almost always fixed at a less sum than the aggregate of local tariffs between near-by stations on the same road. * * * There is an increased cost of local business over through business in the additional fuel consumed and the increased wear upon the machinery of each train involved in stopping at every station."

(See also *Chicago, etc., Ry. Co.* v. *Tompkins*, 176 U. S., 167.)

The shippers, therefore, if they exercise their right to select from among the established routes of the defendants the route of their choice, *are punished:*

First, by being made to pay rates higher than other shippers over the same route and between the same termini, *in violation of section 2 of the law.*

Secondly, by being made to pay rates other than the regularly established and published rates of the defendants, *in violation of section 6 of the law;* and

Thirdly, by being made to pay excessive rates (the sum of the locals), *in violation of section 1 of the law.*

This regulation as to the exaction of local rates is a condition attached to or a part of the routing rule itself, and being unlawful renders the rule unlawful.

VII.

THE ROUTING RULE ESSENTIAL TO AND ADOPTED AND USED FOR THE PURPOSE OF CARRYING OUT A POOLING OR DIVISION OF TRAFFIC ARRANGEMENT BETWEEN THE DEFENDANTS; THEREFORE, UNLAWFUL UNDER SECTION 5 OF THE ACT TO REGULATE COMMERCE.

THE ROUTING RULE NOT THE PROPER REMEDY FOR REBATES.

The testimony shows beyond any question that (1) there is an arrangement between the defendants for a pooling or division of the citrus-fruit traffic between them in certain proportions, and that (2) the routing rule is essential to the carrying out of that arrangement, and (3) was adopted and is used for that purpose. (Rec., 187–190, 197–198, 288, 214–215, 599 et seq., 715 et seq., 369, 608. See argument of Mr. Call, pp. 32–41.)

The Commission so finds (Rec., 67, 68, 74–75), and so does the Circuit Court (Rec., 1026–1034).

It is claimed in behalf of the defendants that they adopted the routing rule for the purpose of putting a stop to the payment to the shippers of rebates by the refrigerator companies and the connections of defendants beyond their own lines. The Commission finds, and the testimony amply sustains the finding, "that the suppression of the practice of allowing rebates was only an incidental result of and was not the primary or principal object of the defendant carriers in taking

over to themselves the control of the routing beyond their respective roads, but that the object was to give effect to the tonnage division."

(Rec., bot. p. 74, top p. 75.)

Conceding that the routing rule was adopted to cure the evil of rebates, being essential to the carrying out of a pooling arrangement and being used for that purpose, it is unlawful under the pooling section (sec. 5) of the commerce act and is equally as reprehensible as the practice of paying and receiving rebates. It is no excuse for one violation of law that it incidentally puts a stop to another. On this point the Circuit Court in its opinion on the demurrer says:

"It is no justification of said rule and practice" (routing rule) "that they are designed to prevent and do prevent unlawful rebates from connecting lines to shippers. Pooling and rebates are both within the prohibitions of the interstate-commerce act and one can not be employed as a preventive of the other." (Rec., bot. p. 1022.)

The statutes provide criminal prosecutions and heavy penalties for the enforcement of the laws prohibiting rebates. (Section 10, act to regulate commerce; section 1, "Act to further regulate commerce," etc., approved February 19, 1903, called the "Elkins Act.") These should be resorted to rather than the unlawful practice of pooling.

That the defendants desire and use routing for the purpose of promoting a pooling arrangement, is shown not only by the testimony above cited and by the findings of the Commission and of the Circuit Court, but also by the following three significant facts:

1. Citrus fruit is the only kind of freight as to which the defendant carriers insist upon designating or controlling the routing to eastern markets.

2. Citrus fruit traffic is the only traffic that is pooled or shown to be covered by a tonnage division arrangement.

3. Without the power of routing, the traffic could not be pooled. If shippers route the traffic, it will necessarily render pooling by the carriers impracticable.

VIII.

MANY CONTROLLING REASONS WHY IN THIS CASE THE INITIAL CARRIERS SHOULD NOT HAVE THE RIGHT OF ROUTING.

The Post case (*Post et al.* v. *Southern R. Co.*, 103 Tenn., 220) is cited by the defendants as sustaining their claim to dictate the routing of citrous fruit traffic, and this extract from the opinion of the Tennessee court in that case is relied upon:

"We are of the opinion that upon the main questions as to the right of the carrier and shipper to designate the route of through shipment at through rates, all other questions being out of the way, the law is and should be that, *in the absence of a sufficient or controlling reason to the contrary*, the carrier should have that right."

It will be noted that the court holds that the carrier has the right of routing only "in the absence of a sufficient or controlling reason to the contrary."

As we have shown, there are many "sufficient and controlling reasons" why the defendants should not in this case have the right of routing. Among them are:

1. Routing by the initial carrier restrains or stifles competition, and is therefore unlawful not only under the act to regulate commerce but under the "anti-trust act," as held by this court in the Joint Traffic Association case.

2. The right of routing gives the initial carrier the power to discriminate between its connections.

3. The right of routing gives the initial carrier the power to discriminate between shippers by giving one the most desirable route and denying it to another.

4. The right of routing gives the initial carrier the power to discriminate between different descriptions of traffic.

5. This power of discrimination is exercised in this case as the right of routing is claimed and practiced only as to citrus-fruit traffic and this is a discrimination against that traffic and the shippers thereof in favor of other traffic and the shippers thereof.

6. The right of routing is essential to the carrying out of a pooling arrangement, and is desired and used in this case for that purpose.

7. Routing by the initial carrier deprives the shipper of the valuable privilege of diverting the traffic *en route* to a more desirable market than the market of original consignment.

8. The initial carriers are not entitled to route the traffic beyond their own roads, because they have contracted for exemption from the common-law liability of a common carrier both on and beyond their own roads.

9. If damages results from negligence of connecting carriers, shippers have to proceed against those connecting carriers, and therefore should have the right of selection as to them.

IX.

THE RIGHT OF ROUTING VALUABLE TO THE SHIPPER—NO CONSIDERATION FOR ITS SURRENDER.

The right of selecting the route over which his shipments shall move is valuable to the shipper, because:

1. It enables the shipper to take advantage of the best and most expeditious route and to select a line made up of carriers financially responsible and from

whom damages can be recovered in case of injury or loss.

2. It enables the shipper, when it is to his interest to do so, to divert the traffic *en route* to another market than that to which it is originally consigned. The testimony shows that this is frequently to the shippers' interest. On this point the Commission finds,

"Prior to January 1, 1900, shippers were permitted by the defendants to exercise the right to control the route *and to divert the freight from the destination point or route named in the bill.* This right to control and to divert shipments before they reached their billed destination is claimed by complainants as a legal right, the exercise of which is necessary to the proper and profitable marketing of these products. The shippers individually or through their freight exchanges are kept advised of the state of the market in eastern cities and they frequently find it of great advantage to have a car which has been billed to Chicago, for instance, stopped at Kansas City, St. Louis, or some other point or sent on farther east to Cincinnati or to New York, where at the time the demand may be greater and price higher than in Chicago. *This practice of diverting carload shipments from the original destination is common and it is usually allowed by carriers throughout the country.* * * * Numerous examples appear in the testimony and are used by complainants in their brief showing that to divert a car to some points or to specified territories the freight *must be sent over particular routes* and that it is necessary for the proper carrying on of his business that the shipper should know and control the route." (Rec., bot. p. 59, top p. 60, 152, 237–8, 257, 274, 983.)

The defendants, while depriving the shippers of the right of routing, so valuable, if not essential, to them, give nothing in return or by way of compensation. There is no reduction in the rate and no assumption of liability for loss or damage.

X.

CONTENTION THAT THE ROUTING RULE IS A TERM OF A CONTRACT GUARANTEEING THE THROUGH RATE AND IS THE CONSIDERATION FOR WHICH THE GUARANTY IS GIVEN.

It is contended in behalf of the defendants that the right of the initial carriers to route the traffic is an essential term of a contract guaranteeing the rate or the consideration upon which that guaranty is based and that the abrogation of the routing rule will carry with it the rate. On this point the Commission says in its report:

> Joint through routes and rates are ordinarily the subject of agreement between the participating carriers, but when they have been established and until finally abrogated or changed they are required by the statute to be kept open to public use. * * * The formation of through routes is not compulsory, but when established and so long as they exist, the obligations, restraints, and regulations of the law attach to them in all respects as fully as to a line composed of a single road." (Rec., 72.)

The Circuit Court says:

> While it is unquestionably true, as contended by the defendants, that joint tariffs over continuous lines are purely matter of voluntary arrangement between the carriers themselves, about which they may specially contract, yet this power of contracting, of course, *is subject to all the prohibitions of the commerce act as well those against pooling as those against unjust charges and discriminations.*" (Rec., 1035.)

If, as we have endeavored to show, the routing rule is an unlawful rule and in violation of both sections 3 and 5 and other sections of the commerce act, it can not defeat the right of the public to have a reasonable rate kept open to shippers. The rate of $1.25 per

hundred pounds has been in effect both before and since the adoption of the routing rule, and in fact ever since the citrus fruit business has become important in amount. (Rec., 70.) Having been maintained before the adoption of the routing rule, presumably it was considered by the defendants reasonable in itself in the absence of that rule. It will hardly be contended that the attachment of an unlawful rule or condition to a reasonable rate will defeat the right of the public to the benefit of that rate. The whole question, then, we may say, is whether or not the routing rule is a lawful rule. We think we have shown that it is not.

The law itself guarantees the shipper a reasonable through rate over every through route established and published as required by the law. In reference to this the Commission says:

"So long as the through route exists the rates established thereon are guaranteed by command of the law itself to every shipper without discrimination, and no greater guarantee can be given by the initial carrier." (Rec., 74.)

If rates fixed by common carriers can in any proper sense be considered as springing from a contract between the shipper and the carrier, such contract differs essentially from a strictly private contract between individuals. If a contract at all, it is a contract to which the public is a party and is subject to all the limitations and conditions prescribed in the laws enacted for the purpose of regulating common carriers in the interest of the public. Such laws are terms of every such so-called contract. Common carriers are quasi-public corporations deriving their franchises or "their right to exist," in the language of this court,

from the public, and the consideration upon which those franchises are granted is the duty imposed upon the carriers to consider and promote the interest of the public and particularly in the matter of rates.

As stated in the preceding subdivision of this argument, there is no consideration whatever passing from the defendants to the shippers for the surrender by the shippers of the valuable right of routing their traffic. The rate was not reduced and the defendants still, as before, contract for exemption from liability not only on the lines of their connections but on their own lines. (Citrus Fruit Tariff, effective January 1, 1900, Rec., top p. 474.)

The routing rule being unlawful, the contract guaranteeing the rate prior to the adoption of the routing rule stands and can not be invalidated by that rule.

Moreover, these so-called contracts between the carrier and the public fixing rates, lack an essential element of a contract. The shippers or the public are not in fact parties to the making of rates. The action of the carriers in fixing rates and attaching conditions is *ex parte*. The public has no voice in the matter. These defendants are the only initial carriers of citrus fruit from southern California and, therefore, have a monopoly of that business. The shipper must accept the rates and the conditions imposed by the defendants or not ship their traffic to market. They are in this matter at the mercy of the defendants. They may in fact be said to be under duress.

The law, on grounds of public policy, will not sanction a condition in a bill of lading exempting the carrier from liability on account of his own negligence. Will it be contended that the guaranteeing

of a rate on condition that the guarantor shall be exempt from liability for damage resulting from his own negligence will defeat the right of the public to the rate freed from such unlawful condition?

XI.

NONJOINDER OF PARTIES DEFENDANT.

The defendants in the court below interposed a general demurrer and also a demurrer on the specific ground that there is a nonjoinder as parties defendant of the connections of the defendants and that such connections are necessary parties.

The citrus-fruit tariffs are published and issued by the defendants as initial carriers, and reserve to the defendants *alone* the right of routing the traffic. If it be conceded that the connections are *proper* parties where the right of only the initial carriers to route is in question, they are not *necessary* parties.

(*I. C. C.* v. *Texas & Pacific Ry. Co.*, 52 Fed. Rep. 188; 162 U. S. 205.)

In the above case there were involved *joint* through rates established by the Texas and Pacific Railway Company and the Southern Pacific Company over the *joint* through line of these two companies from New Orleans to San Francisco. The case involved the legality of the joint through rates of these two roads over this joint through line, but *the suit was against the Texas and Pacific Railway Company alone.* It was pleaded in abatement by the Texas and Pacific Railway Company that the Southern Pacific Company was a party to the joint through rates and was therefore a necessary party defendant. The Circuit Court overruled this plea and its decision was affirmed by this court. The Circuit Court says:

"If the order made by the Commission was a lawful one, I see no reason why the defendant should not be compelled to obey it, notwithstanding the Southern Pacific Company is not at present pursued. If the defendant is violating a proper order of the Commission, it should be restrained from doing so; and it can not escape upon the objection that another wrongdoer is also violating it." (52 Fed. Rep., 188.)

This court sustained this ruling of the Circuit Court, using the following language:

"Another objection urged is that, as the order of the Commission involved rates participated in by the Southern Pacific Company as owner of a portion of the line over which the through freight is carried, that company was a necessary party. Undoubtedly that company would have been a *proper* party, but we agree with the Circuit Court in thinking that it was not a *necessary* one." (*Texas and Pacific Ry.* v. *I. C. C.*, 162 U. S., 205.)

The fact, therefore, that the connections of the defendants constitute parts of through lines with the defendants and participate with them in the through rate over those lines would not render them *necessary* parties defendant, even if the through rate were the matter under consideration. *A fortiori* it does not where the right of routing by the defendants as initial carriers is alone in question. The connections, it is true, are interested in this matter of routing. Their interest, however, is in the direction of having the routing rule abolished.

XII.

POWER OF THE COMMISSION TO MAKE THE ORDER IN QUESTION.

It is contended in effect that the Commission has no authority to make an order such as the order in question relating to routing, because such authority is

not expressly granted in the act to regulate commerce. If this be true, the Commission has no power to prohibit undue preferences or undue prejudices of any kind whatsoever under section 3 of the law.

Section 3 is general, prohibiting "undue preferences" and "undue prejudices" without defining or setting forth what shall constitute such preferences and prejudices. The most usual form of preference or prejudice is in rates; but, if the contention of counsel for the carriers be sound, the Commission would have no power to issue an order forbidding preferences in rates, because section 3 does not specifically prohibit such preferences.

As heretofore shown, section 3 forbids preferences and prejudices of every conceivable character: not only between "persons, companies, firms, corporations, and localities," but also between "particular descriptions of traffic," and forbids such preferences and prejudices "IN ANY RESPECT WHATSOEVER."

The preferences and prejudices forbidden may be in respect to rates, or routes, or cars, or in the distribution of cars, or in the furnishing of facilities for the interchange of traffic, or in any of the various forms in which a preference or advantage may be given or an injury or prejudice inflicted.

In *I. C. C.* v. *Ry. Co.*, 167 U. S., p. 506, this Court holds that the Commission is charged with the duty of enforcing section 3, as follows:

"The Commission is charged with the duty of seeing * * * that no undue preferences are given to one place or places, or individual or class of individuals, but that in all things, that equality of right, which is the great purpose of the interstate commerce act, shall be secured to all shippers."

If section 3 of the law is not void for indefiniteness, and the rule of the defendants in question gives an undue preference or subjects to an undue prejudice within the meaning of that section, then the order of the Commission requiring the defendants to cease and desist from enforcing that rule is an order within the jurisdiction of the Commission.

Respectfully submitted.

L. A. SHAVER, *Solicitor.*

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